

AGENDA BILL APPROVAL FORM

Agenda Subject: Resolution No. 4531		Date: December 8, 2009
Department: Information Services	Attachments: Resolution No. 4531	Budget Impact:
Administrative Recommendation: City Council adopt Resolution No. 4531.		
Background Summary: Resolution No. 4531 removes the institutional network from the franchise agreement and institutes a lease that gives the City of Auburn full rights and access to this network at \$1 per year for 50 years.		
T0104 -3 O4.1.4, A3.17, A3.14		
Reviewed by Council & Committees: <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <input type="checkbox"/> Arts Commission <input type="checkbox"/> Airport <input type="checkbox"/> Hearing Examiner <input type="checkbox"/> Human Services <input type="checkbox"/> Park Board <input type="checkbox"/> Planning Comm. </div> <div style="width: 45%;"> COUNCIL COMMITTEES: <input checked="" type="checkbox"/> Finance <input checked="" type="checkbox"/> Municipal Serv. <input type="checkbox"/> Planning & CD <input checked="" type="checkbox"/> Public Works <input type="checkbox"/> Other _____ </div> </div>		Reviewed by Departments & Divisions: <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <input type="checkbox"/> Building <input type="checkbox"/> Cemetery <input checked="" type="checkbox"/> Finance <input type="checkbox"/> Fire <input checked="" type="checkbox"/> Legal <input checked="" type="checkbox"/> Public Works <input checked="" type="checkbox"/> Information Services </div> <div style="width: 45%;"> <input type="checkbox"/> M&O <input type="checkbox"/> Mayor <input type="checkbox"/> Parks <input type="checkbox"/> Planning <input type="checkbox"/> Police <input type="checkbox"/> Human Resources </div> </div>
Action: Committee Approval: <input type="checkbox"/> Yes <input type="checkbox"/> No Council Approval: <input type="checkbox"/> Yes <input type="checkbox"/> No Call for Public Hearing ____/____/____ Referred to _____ Until ____/____/____ Tabled _____ Until ____/____/____		
Councilmember: Pelosa		Staff: Rempher
Meeting Date: January 4, 2009		Item Number: VIII.B.2

RESOLUTION NO. 4 5 3 1

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF AUBURN, WASHINGTON, AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE AN INSTITUTIONAL NETWORK LEASE AGREEMENT BETWEEN THE CITY OF AUBURN AND COMCAST OF WASHINGTON IV, INC. AND COMCAST OF CALIFORNIA/COLORADO/WASHINGTON I, INC.

WHEREAS, TCI Cablevision of Washington, Inc. ("TCI") and the City entered into a franchise agreement, through Resolution No. 2409, on May 3, 1993 (the "Franchise Agreement"), which became effective on July 1, 1993; and

WHEREAS, pursuant to the terms of the Franchise Agreement, a cable system upgrade, including a bi-directional I-Net was to be completed by September 13, 1997; and

WHEREAS, TCI was not able to upgrade the cable system as required by the Franchise Agreement, which subjected TCI to significant penalties; and

WHEREAS, TCI and the City negotiated a Franchise Extension Agreement which granted a 24-month extension of the deadline to meet its obligations and in exchange TCI agreed in part to install a fiber-optic institutional network (the "I-Net") for the City's sole use; and

WHEREAS, the Franchise Extension Agreement was heard by the City's Committee of the Whole and approved by the City Council through Resolution No. 2972 on June 15, 1998 and accepted by TCI on July 13, 1998; and

WHEREAS, the I-Net was initially completed in or about 1999; and

WHEREAS, Comcast now holds the Franchise Agreement and a dispute between Comcast and the City has arisen over the ownership of the TCI-constructed I-Net, which the parties desire to amicably resolve.

WHEREAS, the City Council finds that the terms set forth in the attached Institutional Network Lease Agreement are in the best interest of the City and its citizens,

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF AUBURN, HEREBY RESOLVES as follows:

Section 1. The Mayor and City Clerk of the City of Auburn, Washington, are hereby authorized to execute an Institutional Network Lease Agreement Between the City of Auburn and Comcast of Washington IV, Inc. and Comcast of California/Colorado/Washington I, Inc., a copy of which is attached hereto, marked as Exhibit "A" and incorporated herein by this reference.

Section 2. The Mayor is hereby authorized to implement such administrative procedures as may be necessary to carry out the directives of this legislation.

Section 3. That this Resolution shall take effect and be in full force upon passage and signatures hereon.

Dated and Signed this _____ day of _____, 2009.

CITY OF AUBURN

PETER B. LEWIS
MAYOR

ATTEST:

Danielle E. Daskam, City Clerk

APPROVED AS TO FORM:

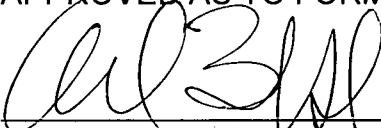

Daniel B. Heid, City Attorney

EXHIBIT 'A'

Institutional Network Lease Agreement

This Institutional Network Lease Agreement (the "Lease Agreement") is entered into this _____ day of _____, 2010, by and between the City of Auburn, Washington (the "City") and Comcast of Washington IV, Inc. & Comcast of California/Colorado/Washington I, Inc. ("Comcast").

RECITALS

WHEREAS, TCI Cablevision of Washington, Inc. ("TCI") and the City entered into a franchise agreement, through Resolution No. 2409, on May 3, 1993 (the "Franchise Agreement"), which became effective on July 1, 1993; and

WHEREAS, pursuant to the terms of the Franchise Agreement, a cable system upgrade, including a bi-directional I-Net was to be completed by September 13, 1997; and

WHEREAS, TCI was not able to upgrade the cable system as required by the Franchise Agreement, which subjected TCI to significant penalties; and

WHEREAS, TCI and the City negotiated a Franchise Extension Agreement which granted a 24-month extension of the deadline to meet its obligations and in exchange TCI agreed in part to install a fiber-optic institutional network (the "I-Net") for the City's sole use; and

WHEREAS, the Franchise Extension Agreement was heard by the City's Committee of the Whole and approved by the City Council through Resolution No. 2972 on June 15, 1998 and accepted by TCI on July 13, 1998; and

WHEREAS, the I-Net was initially completed in or about 1999 [NOTE: VERIFY DATE]; and

WHEREAS, Comcast now holds the Franchise Agreement and a dispute between Comcast and the City has arisen over the ownership of the TCI-constructed I-Net, which the parties desire to amicably resolve.

NOW THEREFORE, in consideration of the foregoing, and of the promises and covenants contained in this Lease Agreement, the parties agree as follows:

Lease

1. Lease of Institutional Network. Subject to the terms and conditions of this Lease Agreement, Comcast hereby leases to the City the "Institutional Network" (I-Net) as described on Exhibit A, attached hereto and incorporated herewith. This Lease Agreement is freely and voluntarily entered into by the

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Parties, without any duress or coercion, and after each party has consulted with its counsel. Each party hereto has carefully and completely read all of the terms and provisions of this Lease Agreement.

2. Lease Term. The lease shall commence upon the full execution of the Lease Agreement by the City and Comcast and shall terminate on December 31, 2058. Unless either party notifies the other prior to the end of the Lease Agreement term, this Lease Agreement shall be renewed automatically for additional subsequent 5-year terms under the same terms and conditions contained herein.

3. Payments. The City shall pay Comcast \$1.00 per year for 50 years commencing upon the effective date of this agreement, for the use and maintenance of the Institutional Network. The Parties agree that this Lease Agreement is not a cable franchising obligation and payments set forth in this Lease Agreement shall not be treated as franchise fees for purposes of 47 U.S.C. § 542, and shall at no time be offset against or deducted from franchise fee payments made to the City under their current Franchise or any renewed franchise.

4. Use of I-Net.

4.1 Upon the effective date, the City shall have sole exclusive use of all I-Net facilities, equipment and capacity outside the physical site termination panels and shall only use the I-Net for non-commercial uses.

4.2 For the purposes of this Lease Agreement, non-commercial means internal network communications from and among government agencies, schools, libraries and other public agencies, which subject to other limitations herein, includes encrypted wireless, internet, telecommunications, information, voice, video and data services. Unless otherwise agreed upon by Comcast and the City, noncommercial internal network communications excludes any other uses, such as the sub-leasing, gifting, or reselling I-Net capacity to a third party for any purpose.

4.3 Unless mutually agreed upon by the City, Comcast may not utilize unused capacity on the I-Net.

4.4 Upon request from Comcast, the City shall provide a report identifying and certifying the City's authorized non-commercial users of the I-net. Comcast shall have the right to verify the fiber connection points outside the physical site termination panels for all users on the I-net to validate the City's report. If there are discrepancies found, both parties shall use the dispute resolution procedure under this agreement to find resolve to the matter.

5. Rules and Regulations. Except as otherwise provided herein, the terms and conditions of Comcast's cable franchise, authorizing cable service within the

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City, as amended and/or renewed throughout the term of this Lease Agreement, shall apply for all construction, maintenance, relocation, and safety actions.

6. Maintenance of Institutional Network. Throughout the term of this Lease, the City shall be responsible for paying Comcast's ongoing cost of maintenance for the I-Net and Comcast shall, at the City's request, perform requested maintenance to the I-Net on a time-and-materials basis. Comcast shall only perform this maintenance if first requested by the City, however, in emergency conditions, such as an emergency resulting from a windstorm or an unplanned fiber cut, Comcast is authorized, when conducting its own emergency work, to effect similar emergency repair work on the I-Net, and the City will reimburse Comcast for its expenses, based on time and materials, to conduct these repairs to the I-Net.

7. I-Net Repair Calls and Escalation. The City acknowledges that Comcast does not actively monitor the signal transmission upon the I-Net, and has no notice of a service interruption or outages but for City-initiated notification. For any necessary repairs of the I-Net as determined by the City's authorized users, they shall notify the City's information technology ("IT") representative, who shall in turn, contact Comcast's designated local Network Operations Center (NOC). Comcast shall respond to any repair request within four (4) hours of receipt of notification at the NOC and shall actively begin working on the problem until it is resolved. In order to document the repair work on the I-Net, Comcast will use its normal trouble ticket processes. In the event of an inability to initially resolve the I-Net problems, Comcast shall follow its normal escalation procedures for correcting fiber interruptions and/or outages. At the City's request, Comcast shall also notify the City and provide documentation of the I-Net problem resolution. Such documentation shall include, among other things, a description of the cause and resolution of the problem for each I-Net trouble ticket.

8. I-Net Ownership & Electronics.

8.1 The City agrees that Comcast has clear and unencumbered title to the I-Net outside the physical site termination panels.

8.2 Comcast shall be responsible for supplying and installing the I-Net and associated facilities and equipment, to the specified site termination panels only, thereby providing a pathway for I-Net communications between all sites.

8.3 The City shall be responsible for providing any "active" equipment or components required for I-Net use, including but not limited to computers, network cards, optronics, electronics, and equipment racks, at the City's sole expense.

8.4 The City may not access any part of the I-Net and associated facilities and equipment outside the site termination panels, and the City's permitted access

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shall in no event extend beyond the City's side of the termination panel. The City shall not attach any equipment or otherwise modify the I-Net in any way that will interfere with the signal quality and the normal operation of Comcast's cable system. Except as provided in this Lease Agreement, Comcast shall not interfere with the signal quality and the normal operation of the I-Net.

9. Modify, Splicing and Attachment. The City may, using the existing I-Net capacity and at its cost, request Comcast modify, splice into, or attach to, the I-Net, outside the site termination panels/demark, to connect to additional City-authorized facilities. Comcast agrees to cooperate with the City to accomplish any modification, splicing or attachments to the I-Net.

10. Relocation. When electric and telephone utility wiring in an area of the City are relocated underground, Comcast shall be responsible for relocating the I-Net at the same time it places its cable facilities underground.

11. Indemnification.

11.1 Subject to Washington Statutes, municipal limits on liability and all immunities the City may enjoy, including the limitation of payment to only those liabilities that the City would have if it was acting by itself and could assert all of its immunities, the City shall indemnify and hold harmless Comcast, its employees, officers and directors, and its Affiliates and employees, officers and directors thereof, from any liability (including reasonable attorneys' fees) for damages arising out of, or resulting from, the City's use of the Institutional Network, or from the use by any Person authorized by the City to use the Institutional Network.

11.2 Comcast shall indemnify, defend and hold harmless the City, and its officers, boards, committees, commissions, elected and appointed officials, employees, volunteers and agents from and against all liability (including reasonable attorneys' fees), damages and penalties which they may legally be required to pay as a result of: (i) Comcast's performance under this Agreement; and (ii) Comcast's unauthorized transmission of a signal over either of the Institutional Network, or as a result of Comcast's unauthorized modification of City signals or signals transmitted by Authorized Users.

12. Successors and Assigns. This Lease Agreement, and the terms, covenants, warranties and conditions hereof, shall be binding upon and inure to the benefit of the parties hereto and their respective authorized heirs, beneficiaries, administrators, executors, receivers, trustees, successors and assigns. Unless otherwise expressly stated herein, nothing in this Agreement shall be construed as an authorization or right of any party to transfer or assign its rights in or delegate its duties under this Agreement without the prior written consent of the other party, except that any consent of the City to the transfer or

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change of control of the Franchise Ordinance shall be deemed a consent to the transfer or assignment of this Agreement.

13. Notice. Unless otherwise agreed to by the parties, any notice provided for under this Lease Agreement shall be sufficient if in writing and delivered personally to the following addressee or deposited in the United States mail, postage prepaid, certified mail, return receipt requested, addressed as follows, or to such other address as the receiving party specifies in writing:

(a) Notices to Comcast shall be mailed to:

Comcast
4020 Auburn Way N
Auburn, WA 98002
Attention: Director, Franchising and Government Affairs

With a non-binding courtesy copy to:

Comcast
15815 25th Ave W
Lynnwood, WA 98087
Attention: Franchising and Government Affairs

(b) Notices to the City shall be mailed to:

Lorrie Rempher
City of Auburn
Auburn City Hall
25 W. Main Street
Auburn, WA 98001

with a copy to:

Auburn City Clerk
City of Auburn
Auburn City Hall
25 W. Main Street
Auburn, WA 98001

(c) Upon request by the City, Comcast shall provide a list of individual(s) contacts associated with the upkeep of the I-Net.

14. Counterparts. This Lease Agreement may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument; and in pleading or proving any provision of this Lease Agreement, it shall not be necessary to produce more than one complete set of such counterparts.

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15. Captions. All headings contained in this Lease Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of the Lease Agreement. Whenever used herein the singular number shall include the plural, the plural shall include the singular, and the use of any gender shall include all genders.

16. Governing Law and Binding Effect. This Agreement shall be construed and enforced in accordance with, and the validity and performance hereof shall be governed by, the laws of the State of Washington. This Agreement shall bind and inure to the benefit of each of the parties and their successors and permitted assigns. Comcast will not take any action to challenge any provision of this Lease Agreement as contrary to law or unenforceable at any time.

17. Waivers and Amendments. This Lease Agreement may not be amended nor shall any waiver, change, modification, consent or discharge be effected, except by an instrument in writing adopted, in the case of an amendment, by each party and, in the case of a waiver, consent or discharge, executed by the party against whom enforcement of such instrument is sought. Any consent by either party to, or waiver of, a breach by the other party shall not constitute a waiver or consent to any subsequent or different breach. If either party shall fail to enforce a breach or this Lease Agreement by the other party, such failure to enforce shall not be considered a consent to or a waiver of said breach or any subsequent breach for any purpose whatsoever.

18. No Third Party Beneficiaries. For purposes of this Lease Agreement, including its intended operation and effect, the parties specifically agree and contract that: (1) the Agreement only affects matters/disputes between the parties to this Lease Agreement and is in no way intended by the parties to benefit or otherwise affect any third person or entity notwithstanding the fact that such third person or entity may be in a contractual relationship with the City or Comcast, or both; and (2) the terms of this Lease Agreement are not intended to release, either by contract or by operation of law, any third person or entity from obligations owed by them to either the City or Comcast.

19. Entire Agreement. This Lease Agreement, including the recitals and schedule herein, contains the entire agreement of the parties and supersedes all other agreements, oral or written, heretofore made with respect to the subject matter hereof and the transactions contemplated hereby.

20. Recitals. The recitals herein are incorporated by reference into this Lease Agreement and are made a part hereof.

21. Assignment. This Lease Agreement and any rights or duties hereunder shall not be assigned by either party without the express written consent of the other party, unless assigned to a parent, affiliate, or subsidiary company.

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22. Binding on Successors. Except as otherwise provided herein, this Lease Agreement shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective successors and permitted assigns.

23. Severability. In the event any one (1) or more of the provisions of this Agreement shall for any reason be held to be invalid or unenforceable, the remaining provisions of this Agreement shall be unimpaired, and shall remain in effect and binding upon the parties, unless such change materially alters either parties ability to perform the material obligations of this Agreement, in which case the parties hereto shall negotiate in good faith to modify this Lease Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner to the end that transactions contemplated hereby are fulfilled to the greatest extent possible.

24. Force Majeure. Neither party shall be liable for any failure of performance (including any delay in restoration of service) hereunder due to causes beyond its reasonable control including, but not limited to, acts of God, fire, explosion, vandalism, storm, or other similar catastrophes; any law, order, regulation, direction, decision, action or request of the United States government or the State of Washington; insurrection; riots or other civil disturbances; or wars.

25. Dispute Resolution. In the event one party to this agreement believes there has been a breach by the other party, the non-offending party shall notify the other party in writing with specific details regarding the exact nature of the alleged breach. The offending party shall have the opportunity to respond to the accusation or cure the alleged breach within 30 days following the receipt of the notice. If the offending party contests any part of the alleged breach set forth in the notice, the parties shall meet to discuss the dispute or submit the matter to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. The parties shall have 60 days to resolve the dispute and in the event that resolution is unsuccessful, the parties shall submit the matter to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules. Either party may appeal the arbitration award as allowed by law.

26. Termination. The City in its sole discretion may terminate this Lease Agreement, by notice given in the manner contained herein.

27. Relation to Franchise. This Lease Agreement is separate and apart from any renewed cable franchise and this Lease Agreement shall supersede any I-Net obligations in the existing franchise and there shall be no I-Net obligation in a renewed franchise through 2058.

28. Reopeners.

28.1 Grounds. The occurrence of any of the following shall be grounds for the City or Comcast to reopen this Lease Agreement:

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(a) Any court action that invalidates or substantially negates the effect of any material provision of this Lease Agreement.

(b) Any state or federal legislation that invalidates or substantially negates the effect of any material provision of this Lease Agreement.

28.2 Reopener Procedure.

(a) The City or Comcast shall make a determination that grounds exist to implement the reopener provisions of this section and shall formally notify the other party in writing and in reasonable detail of that determination, the grounds for it, and the proposed modification deemed necessary to address the event giving rise to the reopener.

(b) For a period of ninety (90) days following receipt of the notice, Comcast and the City shall seek to negotiate an amendment to the Lease Agreement reflecting the grounds identified in notice of reopener.

(c) If Comcast and the City are unable to reach agreement within the ninety (90) day period, the matter may be submitted to mediation, using the mediation procedure set forth in Section 25. If mediation does not resolve the issue, then the parties shall seek direct judicial resolution.

29. Periodic Evaluation. Every three years during the term of this Lease Agreement either party may require evaluation session(s) upon thirty (30) days written notice to the other party. Topics which may be discussed at any evaluation session may include, but are not limited to, the use and maintenance of the I-Net, application of new technologies, system performance, facilities and support, amendments to this Lease Agreement, judicial rulings, legislation, and any other topics that are relevant to the I-Net. As a result of a periodic review or evaluation session(s), upon notification from either party, both parties shall meet and undertake good faith efforts to reach mutual agreement on proposed amendments to the terms and conditions of this Lease Agreement. If mutual agreement is obtained, both parties shall amend this agreement as allowed under Section 17.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first written above.

City of Auburn

Comcast of Washington IV, Inc.

Peter B. Lewis , Mayor

By:
Its:

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Attest:

**Comcast of California/
Colorado/Washington I, Inc.**

Danielle E. Daskam. City Clerk

By:
Its:

APPROVED AS TO FORM:



Daniel B. Heid ,
City Attorney